Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-371

BERNARD BERNSTEIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERNARD BERNSTEIN, Petitioner herein, by his undersigned attorney, respectfully prays that this Honorable Court issue its Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated June 14, 1978; the order of the same Court denying a Petition for Rehearing dated August 2, 1978.

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the United States District Court for the Southern District of Florida, in this cause, has not yet been reported. The opinion is

dated June 14, 1978, a copy of that opinion is attached hereto as Appendix A. A copy of the order denying Petition for Rehearing is attached as Appendix B.

JURISDICTION

Jurisdiction of the Court is invoked under 28 USCA Section 1254(1); it is also invoked under Rule 19 of the Rules of this Court in that it is contended that an important principle of federal law is involved in these proceedings which has not been, but should be, settled by this Court.

Jurisdiction is also invoked under Rule 19(b) of the Rules of this Court in that a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter.

QUESTIONS PRESENTED FOR REVIEW

I

WHEN THE GOVERNMENT HAS RESTED ITS CASE, AND A DEFENDANT ALSO RESTS, THAT DEFENDANT IS ENTITLED AT THAT POINT TO HAVE THE JURY CONSIDER HIS CASE, AND A SEVERANCE SHOULD BE GRANTED UPON REQUEST. THE TESTIMONY OF A CO-DEFENDANT WHO DOES NOT DESIRE TO REST SHOULD NOT BE PERMITTED TO BE CONSIDERED AGAINST THE FIRST DEFENDANT.

II

WHEN AN OVER-ALL CONSPIRACY IS CHARGED, OVERT ACTS IN THAT CONSPIRACY SHOULD NOT BE THE BASIS FOR SUBSTANTIVE COUNTS WHEN NO EVIDENCE OF ANY KIND IS DIFFERENT TO PROVE THE OVER-ALL CONSPIRACY AS OPPOSED TO THE SEPARATE INCIDENTS CONTAINED THEREIN.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V—Constitution of the United States

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, USCA, Section 2

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, USCA, Section 371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.". . .

Title 18, USCA, Section 1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises, or to sell dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." . . .

STATEMENT OF THE CASE

On December 10, 1976, a nineteen (19) count Indictment was returned against BERNARD BERNSTEIN and Co-Defendant, SIDNEY MYRES, charging eighteen (18) substantive counts of defrauding long term lessees of Avis Corporation automobiles through the use of the mails. (Title 18 United States Code §§ 1341,2). One additional count of conspiracy to commit the substantive acts which were contained in the first eighteen (18) counts was also charged. (Title 18 United States Code § 371).

Jury trial resulted in guilty verdicts on each of the nineteen (19) counts.

On June 27, 1977, BERNSTEIN was sentenced to twelve (12) months, arrived at through separate 30 day consecutive and concurrent sentences. A timely Notice of Appeal brought the case to the United States Court of Appeals, Fifth Circuit. That Court affirmed.

STATEMENT OF THE FACTS

The case concerned the Miami office of Avis Leasing Corporation, which was in the business of long term leasing of automobiles. These leases included a customer risk lease and an Avis risk lease. The customer risk lease permitted the customer, at the end of his lease, to purchase the car, or have Avis sell it with the customer receiving the profit or paying for the loss, based on a pre-computed two (2) year depreciated market value figure. The Avis risk lease put Avis in the position of selling at the end of two (2) years, and assuming any profit or loss.

BERNARD BERNSTEIN was a salaried Vice President of the Southeast region of the United States for Avis Leasing. He also received incentive payments. His Co-Defendant, SIDNEY MYRES, was Sales Manager for the Miami office.

Patricia Perez, the Government's key witness, was hired by BERNSTEIN in 1966, as a leasing administrator. This consisted of secretarial, general office, bookkeeping and reception work.

Perez testified that she overheard a conversation between MYRES and BERNSTEIN around the end of 1969, with MYRES telling BERNSTEIN that Avis was not making much money on the customer risk leases, but making money on the full service leases. MYRES said, "We are losing on the sale there, so why don't we take some money from the customer risk leases and put it into the Avis risk lease and, therefore, it would show a bet-

ter profit." BERNSTEIN agreed, and thereafter, the record keeping procedures in the Miami office changed.

This change in policy was reflected in the internal papers between Avis' Miami office and its main office in New York. MYRES directed Perez on how to transfer figures within Avis' internal documents to indicate that customer risk cars sold for less than they in fact sold for. This difference was then added to those figures reflecting the profit made by Avis on its sale of its full service or Avis risk cars. Since the Avis office in New York billed the customer by mail, based upon these documents, the effect of the shifting of the profit figures was that the customer did not receive the profits from the sale of their car. Instead, Avis retained these profits since the adjusted figures out of Miami made it appear that the profits belonged to Avis from the sale of their full service lease cars.

A copy of all documents sent to New York were kept in the Miami office and the Government introduced several of these copies which reflected the shifted figures.

Around September, 1974, in the Miami office, BERNSTEIN said that New York was running an audit and that all members of the staff were to cooperate. Perez testified that BERNSTEIN further added that, "we better stop moving the money around". In early 1975, Perez and Mrs. Elizabeth Klicka, a secretary overheard (by means of eavesdropping on the telephone) a conversation between BERNSTEIN in Miami and Mr. Dame in New York. Dame was Vice President in charge of Avis leasing. During the conversation, Perez overheard Dame instructing BERNSTEIN that there was to be no more movement of money; that the auditors had found it and it didn't look very good. BERNSTEIN responded, "yes, sir, we won't do it anymore".

Mr. Kenneth Jackson, a former employee in the Miami Avis Leasing office, from November, 1973, through December, 1974, testified that during the fall of 1975, (six months after the fact) BERNSTEIN told him that while he (BERNSTEIN) was at Avis, money was moved between the customer risk lease and the Avis risk lease. There was no evidence from Jackson that BERNSTEIN was aware of this while working for Avis. The Government then rested.

After a stipulated tender of bank deposit receipts, BERNSTEIN rested. Thereafter, BERNSTEIN moved for a bifurcated trial since he had rested, adding that no further evidence could be admitted against him.

The Court denied the Motion for Bifurcation, as well as a Motion for Severance. The Court also denied a request for a jury instruction that no evidence received from MYRES be considered against BERNSTEIN.

MYRES' testimony implicated BERNSTEIN.

The basis for federal jurisdiction raised here, concerning Question I, was raised for the first time in the trial Court. The basis for jurisdiction on Question II is being raised for the first time.

REASONS FOR GRANTING THE WRIT

I

From the cases cited by the Government and Petitioner in the Court below, it is apparently the fact that the question presented herein has not been decided by this Court. It is the contention of Petitioner that the question is of sufficient Constitutional importance as to warrant a clarification and determination of procedure.

The Government, after presenting its case, rests. One of the two defendants on trial also rests. A request is made for a bifurcated trial at that point, or a severance. The bifurcated trial would permit the case to be argued to the jury after the Government had presented its case and prior to any evidence being adduced by a co-defendant. The Court in this case refused bifurcation, refused severance and denied a motion for a special instruction as to limitation of the reception of the evidence by the jury so that it could only be considered against the testifying defendant.

No case cited by the Government, or found by counsel, squarely presents this question. The primary cases presented in the Court below are: *Rickey* v. *U.S.*, 242 F. 2d 583 (5th Cir. 1957); *U.S.* v. *Polizzi*, 500 F. 2d 856 (9th Cir. 1974); *U.S.* v. *Kahn*, 366 F. 2d 259 (2nd Cir. 1966) and *Brown* v. *U.S.*, 56 F. 2d 997 (9th Cir. 1932). Each of the cases cited holds for the rights of a co-defendant's testimony to be considered against a non-testifying defendant who has rested. The only disagreement comes from District Judge Webster, in *Brown*, supra, where he said:

> "It seems obvious that the testimony of Tooze should not have been eliminated. It was a part of his defense and he had the right to have it considered by the jury in connection with his guilt or innocence, but the portion of the motion which in effect requested the court to limit the testimony to the defense of Tooze and that it should not be considered as affirmative evidence against Brown, in my opinion, should have been granted and that it was reversible error to refuse it. I am unable to see how testimony given by one co-defendant jointly on trial in support of his defense can be regarded as affirmative evidence in behalf of the

> government against another defendant who elects not to offer any defense after the government has rested its case as to him."

Petitioner does contend, however, that the statutory and evidentiary right to consider the testimony of a co-defendant against a non-testifying defendant who has rested, clashes with the constitutional rights of a fair trial and due process of law.

It is respectfully urged that the burden on the government to prove *its* case beyond a reasonable doubt should mean that a defendant who chooses to remain silent has fixed rights under the Fifth Amendment at the point when the government rests its case. This right is constitutional, not evidentiary.

Judicial economy (one of the reasons, though not the most important for denying severance) is afforded by permitting one trial and yet granting a defendant who chooses not to testify to have the jury determine his guilt or innocence at that point, and then permitting the case to continue against the other defendant.

In the recent decision of *U.S.* v. *Rivera, et al.*, 554 F. 2d 1375 (5 Cir. 1977), there is a clear inference that had Blanca Rivera's attorney requested the court to instruct the jury that she had rested her case at the close of the government's case, the court would have instructed the jury that no further evidence introduced by the co-defendant could be admissible against her. Clearly, in the present case, defense counsel's actions fit the *Rivera* standards of announcing both to the court and to the jury that he had rested his case. Moreover, defense counsel in the present case requested a severance or limiting jury instruction, neither of which were requested in *Rivera*. Accordingly, a severance,

or, at a constitutional minimum, the requested jury instruction should have been given. It is submitted that the District Court abused its discretion by denying the Motion for Severance; and alternatively, as requested, the Court should have instructed the jury pursuant to Rule 105 of the Federal Rules of Evidence.

Under the due process clause of the Constitution, a defendant is presumed to be innocent and this presumption "imposes on the prosecution the burden of proving the guilt of the accused beyond a reasonable doubt." *Estelle* v. *Williams,* 425 U.S. 501, 96 S.Ct. 1691 (1976) (Justice Brennan, dissenting). See also *In Re Winship,* 397 U.S. 358, 361-364, 90 S. Ct. 1068 (1970); *Coffin* v. *U.S.,* 156 U.S. 432, 453, 15 S. Ct. 394 (1895). Keeping in mind the fact that a defendant has rested his case and the government has already introduced against him all the evidence at its disposal, it is submitted that the government should not be permitted to gain the upper hand in a prosecution by allowing a co-defendant to introduce during the presentation of his case further incriminating testimony against a defendant who has not testified and has already rested.

II

Each of the counts involved a substantive count and a charge of being an aider and abettor. The last count in the Indictment charges a conspiracy in which the overt acts are comprised of each of the prior substantive counts and discussions concerning them. It is submitted that the nature of conspiracy and aiding and abetting are identical where neither party is identified as the principal as opposed to the aider and the abettor.

Petitioner recognizes the fact that substantive counts and a charge of conspiracy may co-exist. It is urged, however, that that co-existence must be denied where the substantive counts are necessarily identical and where no evidence of any kind is different.

A conspiracy cannot be committed by one conspirator alone. *Herman* v. *U.S.,* 289 F. 2d 362 (5th Cir. 1961). Obviously, aiding and abetting a principal cannot be committed by the aider and abettor alone.

This argument is made to the Indictment and its effect upon separate convictions where only conviction of one count is constitutionally proper. Where substantive offenses are the overt acts supporting conviction on the conspiracy count, multiple convictions are not permissible since identity of proof is present. One cannot be convicted twice for the same offense. See *Brown* v. *Ohio,* 97 S. Ct. 2221 (1977), in which the Supreme Court's conclusion that the 2 offenses were identical, for the purposes of double jeopardy, was based on a test formulated in *Blockburger* v. *U.S.,* 284 U.S. 299, 52 S. Ct. 180 (1932).

This test emphasizes the elements of the two crimes. The *Blockburger* test is only satisfied when each offense requires proof that the other does not, notwithstanding a substantial overlap in the proof. *Iannelli* v. *U.S.,* 420 U.S. 770, 95 S. Ct. 1284 (1975).

In the instant cause, there were several substantive counts which consisted of a charge of aiding and abetting, and the crime itself. However, it should be noted that this Defendant was charged with the crime itself, only as a result of his actions in aiding and abetting the perpetrator of the crime. Conviction on all the counts is not constitutionally proper since the double

jeopardy clause should bar multiple punishments for the same offense.

It would seem that all of this is moot in light of the general rules of conspiracy which say that there can be separate convictions for a substantive crime and a conspiracy arising therefrom; and that this would not be violative of due process or the double jeopardy clause of the United States Constitution. However, in the case at issue, the substantive charges arise, not from perpetration of the crime itself, but as the substantive counts to the Indictment state, the conviction was for aiding and abetting. Under these circumstances, an exception to the conspiracy rules arises. Aiding and abetting has been uniformly defined as one who gives comfort or who commands, advises, instigates or encourages another to commit a crime. Thus, to be an aider and abettor, there must be at least one other person involved. *Johnson* v. *U.S.*, 195 F.2d 673 (8th Cir. 1952).

Thus, we have come the full circle, for we have the rule, and then the conspiratorial exception, and finally, as in the instant case, the above-mentioned exception to the conspiracy rules and the merger doctrine thus comes into play.

CONCLUSION

It is respectfully submitted, that for the foregoing reasons, the Writ should issue so that the entire record may be reviewed.

Respectfully submitted,

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APPENDIX

APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5426

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SIDNEY G. MYRES and BERNARD BERNSTEIN,
Defendants-Appellants

Appeals from the United States District Court for the Southern District of Florida

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(June 14, 1978)

Before BROWN, Chief Judge, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule. 21.[1]

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[1] *See* NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

APPENDIX B

[Title omitted in printing]

On Petitions for Rehearing

Filed August 2, 1978

Before BROWN, Chief Judge, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

Form 703-3

APPENDIX C

[Title omitted in printing]

Filed August 15, 1978

Order

( ) The motions of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(x) The motion of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 1, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the parties above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ CHARLES CLARK
United States Circuit Judge